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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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DR. LEE ROY BLACK
Director of the Missouri Department of
Corrections and Human Resources,
DICK D. MOORE,
Chairman, Missouri Board of Probation and Parole,
*Petitioner,*

vs.

NICHOLAS J. ROMANO,
*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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## BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA, ILLINOIS, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICI STATES

In 1982 over 1.3 million adults were on probation in the United States.[1] Probation revocation hearings are being conducted daily in each state. Thousands of such hearings will be conducted each year in the United States. The states have a definite interest in insuring the prompt and economical administration of their criminal justice systems: "The State, of course, has a fundamental interest in appropriately punishing persons ..... who violate its criminal laws." *Bearden v. Georgia*, 103 S.Ct. 2064 at p. 2071(1983).

If the decision of the Eighth Circuit is affirmed, in the present case, state prison officials will be subjected to numerous additional habeas corpus actions based on the alleged failure of state judges to consider particular alternatives to incarceration. The decision of the Supreme Court of the United States in this case may affect the type of evidence which the state will be required to introduce in a probation revocation case. Affirmation of the Eighth Circuit decision would significantly expand the role of federal courts in reviewing state sentencing and probation revocation procedures. And, finally, the remedy fashioned by the lower federal courts in this case constitutes a shocking intrusion by federal courts into state criminal justice proceedings.

## STATEMENT

On April 3, 1977, Nicholas James Romano was given two concurrent twenty-year prison terms. The concurrent sentences were suspended on the condition that Romano abide by the terms of probation for five years. Two months after being placed on probation, Romano ran over a pedestrian and left the scene of the accident. One month

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[1] 14 CRIM. JUST. NEWSL. 4 (Oct. 10, 1983)

later the trial court found that Romano had violated the terms of his probation. The trial court ordered Romano to serve the two twenty-year prison terms.

State authorities released Romano on parole after he had served five and one-half years of his twenty-year sentence.

The United States District Court for the Eastern District of Missouri and the Eighth Circuit of the United States Court of Appeals found (1) that the state judge had failed to consider alternatives to incarceration, (2) that the failure of the judge to consider alternatives to incarceration amounts to a denial of due process, and (3) that an appropriate remedy was an order by the federal court terminating state supervison of Romano's parole.

## DISCUSSION

### I. THE DUE PROCESS CLAUSE DOES NOT REQUIRE AN AFFIRMATIVE SHOWING THAT ALTERNATIVES TO INCARCERATION HAVE BEEN CONSIDERED EVERY TIME PROBATION IS REVOKED.

No individual should be confined any longer than is necessary to meet the reasonable and proper goals of the state. The reasonable and proper goals of the state include promoting the general safety of its citizens and reforming criminals. Sentencing judges are regularly faced with the extremely difficult task of finding the appropriate sentence for each defendant. Probation is a valuable tool for the sentencing judge. Under proper conditions, probation may benefit the convicted defendant, citizens in general, and overcrowded state prison systems.

From the perspective of the sentencing judge, probation is a viable and valuable alternative to incarceration only if the judge can set reasonable terms of probation and can reasonably expect the terms of probation to be enforced. Probation is a less valuable tool if probation cannot be revoked promptly upon a showing that the defendant has

violated the terms of probation.

The decision of the Eighth Circuit would require state judges to indicate on the record that they had considered alternatives to incarceration at the time of the revocation of probation. The cases cited by the Eighth Circuit in support of its decision do not indicate that the Due Process Clause requires state courts to affirmatively consider alternatives to incarceration. *Morrissey v. Brewer*, 408 U.S. 472 (1972) clearly stated the minimum requirements of due process in revocation proceedings (408 U.S. at p. 489); and both the majority opinion and the dissenting opinion left to the states the authority to establish revocation procedures (408 U.S. at pp. 488, 499). Justice Douglas, dissenting in part, wrote, "We do not sit as an ombudsmen, telling the States the precise procedures they must follow."

*Gagnon v. Scarpelli*, 411 U.S. 778 (1973) held that due process standards applied to the revocation of probation, held that due process did not include a right to counsel in *all* revocation hearings, and held that the due process rights available in revocation hearings are more limited than the rights of an accused in a criminal prosecution (411 U.S. at p. 789). Despite the holding of *Gagnon*, the Eighth Circuit appears to have afforded Romano a right to which he was not entitled at his original trial and sentencing— the right to require the sentencing judge to consider *on the record* the alternatives to incarceration.

Alternatives to incarceration are mentioned by the Court in *Bearden v. Georgia, supra* at 2072-73:

> If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternate measures are not

> adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.

The language quoted above indicates that at a revocation hearing, the court must consider alternatives to incarceration if the probationer is unable to pay despite bona fide efforts to do so. It seems logical to conclude that if the probationer is able to pay, but refuses to do so, the court is *not* required to consider alternatives to incarceration. Under *Bearden* if Romano had refused to pay a fine, Romano could have been sentenced "to imprisonment within the authorized range" of the court's sentencing authority, apparently without any requirement that the trial court again consider alternatives to incarceration.

## II. THE REMEDY ADOPTED BY THE DISTRICT COURT AND THE EIGHTH CIRCUIT IS AN UNWARRANTED INTRUSION INTO STATE CRIMINAL PROCEEDINGS

Petitioner's Brief on the Merits adequately sets forth the reasons that Romano is not entitled to any remedy in this case. If a remedy were warranted, the remedy should be that which least intrudes upon the state judicial system. The remedy fashioned by the lower federal courts displays a shocking disregard for the state judicial system.

In this case the federal courts found that the sentencing judge had failed to consider alternatives to incarceration at the hearing on revocation of probation. The normal, reasonable remedy for such an error, if it was error, would be to remand the case to the sentencing judge for consideration of alternatives to incarceration. Without reference to any statute or relevant case and without logical discussion, the Eighth Circuit summarily freed Romano from further supervision by state authorities. When a federal court deprives a state of jurisdiction over a convicted defendant, the state is entitled to a written

decision which lucidly sets forth the reasons for the action by the federal court. 28 U.S.C. §2254; *Sumner v. Mata*, 449 U.S. 537 (1981).

This Court issued a relevant statement on the relationship between state and federal courts in *Jackson v. Denno*, 378 U.S. 368 (1964). In that opinion this Court held that it was error for a federal court to deprive a state court of the opportunity to hold a hearing which the state court had previously failed to hold. Any other result "would not comport with the interests of sound judicial administration and the proper relationship between state and federal courts." 378 U.S. at 395. This Court, quoting with approval from *Rodgers v. Richmond*, 365 U.S. 354 (1961). expressed a concern about federal judges pre-empting functions "that belong to state machinery in the administration of state criminal law." 378 U.S. at 393. The remedy fashioned by the district court and affirmed by the Court of Appeals in *Romano* violates all of the sound principals discussed by this Court in *Jackson*. *See also Bromley v. Crisp*, 561 F2d 1351 (1977) *cert. den.* 435 U.S. 908.

## CONCLUSION

Sentencing judges consider alternatives to incarceration each time a sentencing judge places a defendant on probation. There is no reason to presume that the sentencing judge has forgotten that there are alternatives to incarceration when probation is revoked. Requiring a statement that alternatives to incarceration have been considered is an unwarranted expansion of the Due Process Clause.

The decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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